

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE TUCKER,

Plaintiff/Counter-Defendant-
Appellant,

v

TAMI H. DEVEROUX,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

April 18, 2006

No. 266472

Macomb Circuit Court

LC No. 02-001711-DC

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ

PER CURIAM.

Plaintiff appeals as of right an order modifying parenting time and denying his motion for change of custody or for an evidentiary hearing in this action seeking custody of the parties' minor child.¹ We affirm.

Plaintiff argues that the trial court erred by summarily denying without an evidentiary hearing plaintiff's postjudgment motion for change of custody of the minor child. We disagree. This Court applies three standards of review in custody appeals: "all custody orders must be affirmed on appeal unless the trial court's findings [of fact] were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28." *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005) (citation omitted). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.*, p 194 (quotation marks and citation omitted).

The critical consideration in a custody dispute is the child's best interests, and the Child Custody Act (CCA), MCL 722.21 delineates the twelve factors that bear on the best interest assessment:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

¹ Ashleigh, aged 3 ½ at the time of the lower court proceedings.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if . . . of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

The CCA further requires that a party seeking a change in custody first establish “proper cause” or a “change of circumstances.” MCL 722.27(1)(c). Only on such a showing may a court modify or amend prior custody judgments or orders: “if the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing” *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). The moving party must prove proper cause or change of circumstances by a preponderance of the evidence even before the court may consider whether an established custodial environment exists; this threshold is in place to protect “against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.” *Vodvarka, supra*, p 509 (citation omitted). We find on the facts of this case that plaintiff failed to make the requisite showing, and the trial court therefore correctly declined to hold an evidentiary hearing.

This Court in *Vodvarka* identified the elements of proper cause and change of circumstances sufficient to reopen a custody issue. Proper cause requires proof “by a preponderance of the evidence” of “an appropriate ground for legal action”; “[t]he appropriate

ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Id.* at 512. To prove a change of circumstances, the moving party "must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513. This requires a showing of "something more than the normal life changes (both good and bad) that occur during the life of a child," and "that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-14. This is a case-by-case inquiry, with the relevance of the facts of each case weighted according to the statutory best interest factors. *Id.* at 514.

Plaintiff argues several bases for revisiting custody, but each fails to establish proper cause or a change of circumstances. First, plaintiff alleges that defendant had been charged with crimes "within the last three years," but the original custody order was entered two and half years prior to this charge, and plaintiff did not specify which, if any, criminal charges were brought after the order of custody, other than one charge of stalking for which plaintiff was the complaining witness, and so has failed to show a change of circumstances.

Second, plaintiff alleges that defendant obtained a personal protection order on behalf of the child against plaintiff's girlfriend. Because there is evidence of a good faith belief by defendant that this protection order was warranted, we find no proper cause or change of circumstances.

Third, plaintiff contends that defendant has been constantly forced to move because of evictions. The statutory best interest factors provide that the child's best interests include "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). However at the hearing on plaintiff's motion, defendant stated: "I've been in the same house for a year now . . . and I'm looking into buying it." Plaintiff has presented no evidence to rebut defendant's claim or to support his own.

Fourth, plaintiff alleges that defendant "continually causes problems between the Plaintiff and his daughter and continually lies to the child." The best interest factors consider the "willingness and ability of each" parent "to facilitate and encourage" a relationship between the child and the other parent. MCL 722.23(j). Plaintiff's allegations, however, are vague and unsupported by any evidence, and therefore are not proper cause for revisiting custody.

Fifth, plaintiff alleges that defendant discourages the child from having a relationship with plaintiff. The best interest factors favor each parent facilitating a relationship between the child and the other parent. MCL 722.23(j). However, plaintiff does not show that this alleged circumstance is different from that existing before the original custody order, nor does plaintiff provide any specifics or proofs.

Sixth, plaintiff alleges that defendant is now on public assistance and lacks the financial ability to care for the child properly. The ability to care for the child's material needs is a consideration, MCL 722.23(c), but in this case the allegation is vague. Plaintiff has not shown that defendant's receipt of public assistance has or will have a detrimental effect on the child. Defendant alleges that she has no child care expenses because she cares for the child during the day. It appears that the public assistance at issue allows defendant to be with her child during the day, which weighs against a custody change, given MCL 722.23(b), identifying the child's

receipt of love, affection, guidance and education as a key factor. In addition, defendant contends that plaintiff obtained this information illegally, and plaintiff nowhere explains how he obtained it. We find that the mere receipt of public assistance, under the circumstances of this case, does not constitute proper cause or a sufficient change of circumstances to warrant revisiting custody.

Seventh, plaintiff alleges that the Macomb County Friend of the Court and the Macomb County Psychodiagnostic Clinic recommended that plaintiff receive sole custody of the child. The mental health of a parent is relevant to a child's best interests. MCL 722.23(g). However, the Friend of the Court recommendation is dated February 2003, before the original custody order, and plaintiff fails to show when the Clinic made its alleged recommendation.

Despite the many allegations, plaintiff has failed to make the threshold showing of either a change of circumstances or proper cause. The trial court did not err in denying plaintiff's motion for change of custody without an evidentiary hearing.

Plaintiff next argues that the trial court judge should be disqualified. This issue is not properly preserved for appellate review because plaintiff made no motion below to disqualify the trial court judge. See *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). In any event, the motion was not filed within the requisite 14 days of "discover[ing] the ground for disqualification," nor was the requisite affidavit stating the grounds attached. MCR 2.003(C)(1); MCR 2.003(C)(2). In civil cases, unpreserved issues are generally reviewed for plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

A judge may be disqualified where "[t]he judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1). An adverse ruling or rulings, even if erroneous, are not grounds for disqualification of a trial judge. See *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1996); *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). Disqualification is warranted only on "a showing of actual bias or prejudice." *Ireland, supra*, p 450.

Here, the trial court judge merely ruled against plaintiff on the issue of revisiting custody. We find nothing in the record suggesting actual bias or prejudice. Plaintiff has failed to demonstrate plain error.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald